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In the

Supreme Court of the United States

OCTOBER TERM, 1955

No. 411

TEXAS CONSTRUCTION COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF CALDWELL FOUNDRY AND MACHINE COMPANY, INC.,
Respondent.

RESPONDENTS REPLY BRIEF TO PETITION FOR CERTIORARI

HAWKINS GOLDEN,
WILLIAM BURROW,
LEAKE, HENRY, GOLDEN & BURROW,
First National Bank Building,
Dallas, Texas,
Attorneys for Respondent.

Of Counsel:
W. BRUCE WHITE,
EUGENE H. HAWKINS,
SMYER, SMYER, WHITE & HAWKINS,
Title Building,
Birmingham, Alabama.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Respondent, United States of America for the use and benefit of Caldwell Foundry and Machine Company, Inc., hereinafter called Caldwell, files this its reply to the petition for a writ of certiorari of Texas Construction Company and United States Fidelity and Guaranty Company, hereinafter called Tecon.

OPINION BELOW

The opinion below is reported in *224 F. 2d 289*.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Art. 3, Sec. 2, Cl. 1:

"Section 2. Jurisdiction of Courts

"Section 2. The judicial Power shall extend to all Cases, in law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * * to Controversies to which the United States shall be a party; * * * between Citizens of different States; * * *"

28 U. S. C. A., Sec. 1331:

"§ 1331. Federal question; amount in controversy

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States. June 25, 1948, c. 646, 62 Stat. 930."

28 U. S. C. A., Sec. 1332:

"§ 1332. Diversity of citizenship; amount in controversy

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

"(1) Citizens of different States: * * *.

June 25, 1948, c. 646, 62 Stat. 930."

28 U. S. C. A., Sec. 1345:

"§ 1345. United States as plaintiff

"Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States * * *. June 25, 1948, c. 646, 62 Stat. 933."

28 U. S. C. A., Sec. 1391:

"§ 1391. Venue generally

'(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

"(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes. * * * June 25, 1948, c. 646, 62 Stat. 935."

Heard Act:

Former 40 U. S. C. A. 270; Acts: Aug. 13, 1894, c. 280, 28 Stat. 278; Feb. 24, 1905 c. 778, 33 Stat. 811; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat, 1167; repealed Aug. 24, 1935, c. 642, Sec. 5, 49 Stat. 794: Bonds of Contractors, etc. See Appendix, p. i.

Miller Act:

40 U. S. C. A. 270 a. b. Act Aug. 24, 1935, c. 642, 49 Stat. 793. Bonds of Contractors for Public Building or Works, etc. See Appendix, p. iii.

DEFENSE PRODUCTION ACT OF 1950:

50 U. S. C. A., App.:

"§ 2157. Liability for compliance with invalid regulations * * *

"No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from his compliance with a rule, regulation, or order issued pursuant to this Act (sections 2061-2166 of this Appendix), notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid. * * * Sept. 8, 1950, c. 932, Title VII, § 707, 64 Stat. 818.

"§ 2073. Penalties for violation of title

"Any person who willfully performs any act prohibited, or willfully fails to perform any act required, by the provisions of this title or any rule, regulation, or order thereunder, shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both. Sept. 8, 1950, c. 932, Title I, § 103, 64 Stat. 799.

"§ 2154. Rules, regulations, and orders

"The President may make such rules, regulations, and orders as he deems necessary or appropriate to carry out the provisions of this Act (sections 2061-2166 of this Appendix). Any regulation or order under this Act (said sections) may be established in such form and manner, may contain such classifica-

tions and differentiations, and *may provide for such adjustments and reasonable exceptions* as in the judgment of the President are necessary or proper to effectuate the purposes of this Act (said sections), or to prevent circumvention or evasion, or *to facilitate enforcement* of this Act (said sections), or any rule, regulation, or order issued under this Act (said sections). * * * Sept. 8, 1950, c. 932, Title VII, § 704, 64 Stat. 816; July 31, 1951, 7:00 p.m., E. D. T., c. 275, Title I, § 109(c), 65 Stat. 139."

NATIONAL PRODUCTION AUTHORITY, REG. 2, OCT. 3, 1950. TITLE 32 a, NATIONAL DEFENSE, BASIC RULES OF THE PRIORITIES SYSTEM:

"§ 11.22. *Defense against claims for damages.* No person shall be held liable for damages or penalties for any default under any contract or order which shall result directly or indirectly from compliance with any regulation or order of the NPA (including any direction, directive or other instruction) notwithstanding that any such regulation or order shall thereafter be declared by judicial or other competent authority to be invalid.

§ 11.18. *Delivery for unlawful purposes prohibited.* No person shall deliver any material which he knows or has reason to believe will be accepted, redelivered, held or used in violation of any order or regulation of the NPA.

"§ 11.26. *Violations.* Any person who wilfully violates any provision of this regulation or any other regulation or order of the NPA, or furnishes false information or conceals any material fact in the course of operation under any such regulation or order, is guilty of a crime and upon conviction may be punished by fine or imprisonment or both. In addition, administrative action may be taken against any such person to suspend his privilege of making or receiving

further deliveries of materials or using facilities under priority or allocation control and to deprive him of further priorities assistance.

"§ 11.13. *Sequence of filling rated orders.* * * *

"(d) In the usual case, the date on which specifications have been furnished to the manufacturer in sufficient detail to enable him to put the product into production is to be considered the date on which the rated order is received.

"§ 11.14. *Changes in customers' orders.*

"(a) The general rule is that any change in a customer's rated order constitutes a cancellation of the order and must be considered as a new order received on the date of the change, if the change will require the manufacturer to interfere with his production. * * *"

STATEMENT

Respondent, on February 2, 1950, contracted to furnish, and did thereafter furnish, machinery to raise and lower gates on the spillway of a dam which Petitioner Tecon constructed under its contract with the Federal Government. Respondent's right to recover the purchase price is not contested, and the issues arise on Tecon's cross-complaint for damages for claimed delay in delivery. Caldwell defended on the grounds, among others, that all delay was due to the impossibility of performance earier, under the priorities laws and regulations or before the Government engineers decided on the final plans.

The performance of respondent's contract was routine until the impact of the Korean hostilities, which began June 25, 1950, began to be felt. Respondent was an old, experienced foundry, with ample facilities, and petitioner

was a new, inexperienced contractor with its first big job (R. 41, 96, 97, 112, 268).

Submission to Respondent by Petitioner of anchorage plans was necessary before Respondent could complete the detailed shop drawings. When the anchorage plans were finally forwarded to Respondent on July 14, 1950, Respondent promptly, within a few days, completed and forwarded the shop drawings (R. 141-142). When these shop drawings were approved, Respondent ordered the electrical equipment the very day of approval (R. 108). In Respondent's order, it specified a Cutler-Hammer brake because it was specified in the specifications to the prime contract (R. 99, Item K, R. 110-111).[1] Furthermore, Cutler-Hammer was the only company that made such a brake (R. 53-54). At this time of the order, Respondent had a firm promise from its supplier to supply the electrical equipment within ample time to complete the contract, even within a year (R. 111, 132, 158-159). Furthermore, Respondent proceeded to fabricate, and did fabricate, all the foundry work in ample time to have filled the contract within a year (R. 112).

In the meantime, however, on September 8, 1950, Congress passed the Defense Production Act of 1950. On September 18, 1950, a freeze order was issued thereunder, and on October 3, 1950, strict priorities regulations were imposed [Respondent's (Plaintiff's) Original Exhibit 13]. The American success at the Inchon landings September 15, 1950, was followed by the disastrous retreat from the Yalu

[1]Lines 7, 8 and 9, R. 111, are clerical errata, and not part of the purchase order.

which began November 24, 1950. On November 29, 1950, copper, a necessary ingredient to these motors and the electrical equipment, was frozen [Respondent's (Pl.) Orig. Ex. 13].

Thereafter, Caldwell, its supplier and the down the line suppliers, were all engaged wholly, or almost wholly, in war work, and the electrical equipment order took its regular place in the priority system with delivery no sooner and no later than diligence and patriotic obedience to the law required (R. 113-115, 161-169, 175-178, 182-188). The electric brakes had to be specially manufactured by Cutler-Hammer and no such brakes of any brand could be procured elsewhere (R. 53, 54, 178, 269). As the Circuit Court stated, after having "carefully studied the record * * * there is no testimony to the contrary." *224 F. 2d 289, 292.*

Furthermore, the U. S. Army Engineers, pressed with other and heavy war duties, did not make final decisions with regard to the electrical plans until May 26, 1951 (R. 117-121, 144-145). These decisions were required by the prime contract and its specifications, before the manufacturer of the electrical equipment could proceed, and were due to imperfections in the original plans called to the attention of the U. S. Engineers as the prime contract required [R. 116-119, 174-175, Art. 2, p. 3, Respond. (Pltff.) Orig. Ex. 15].

Respondent, by the specifications to the price contract, had no contractual relations with the United States Government, so that only Tecon could deal with the Govern-

ment [Art. GC-6, p. 4, Pet. (Def.) Orig. Ex. 14]. The prime contract gave Tecon ample remedies for any damages caused by Government acts (Art. 3, 4, Resp. Orig. Ex. 15; Sec. GC-11, p. 5, Pet. Orig. Ex. 14). Tecon and the Government, in March, 1952, reached an accord, through Change Order 12, signed by both parties, whereby the Government gave Tecon an extension of 92 days, thereby forgiving liquidated damages, which instrument stated delay was due to "delay in delivery of critical material" (R. 208-209, 252-253).

For a more detailed statement, Respondent adopts the statement of the court below contained in *224 F. 2d 289, at 289-292.*

Respondent challenges the misstatements on 7 and 8 of the petition as to Petitioner's damages concerning Respondent's abandonment of its position with regard to delays, but says that same are not essential to this writ. Furthermore, Respondent challenges page 9 of Petitioner's statement as to dates or orders as misleading and the rest of 9 and 10 as argumentative. Dates of orders are artificially set by priority regulations. § 11.13 N. P. A. Reg. 2, Pl. Orig. Ex. 13, supra 6.)

ADDITIONAL STATEMENT ON ORIGINAL JURISDICTION

Respondent brought suit in the name of the United States under the Miller Act [*20 U. S. A. 270b(b)*] against the bondsman petitioner, and also joined Tecon, the principal. Tecon brought a cross-complaint against Caldwell in Respondent's own name, not mentioning the United

States. Respondent alleged: that Caldwell was an Alabama corporation; that the petitioner Tecon was a Delaware corporation, and the petitioner United States Fidelity & Guaranty Company was a Maryland corporation. Respondent further alleged that Tecon's office and principal place of business, and the United States Fidelity & Guaranty Company's Texas office and place of business, were at Dallas, and that both were doing business and were found, and did reside, for venue purposes, within the Northern District of Texas (R. 2). Petitioners admitted these allegations (R. 12). Respondent further alleged that jurisdiction arose under the Miller Act *(40 U. S. C. 270 a-d)* and by virtue of diversity of citizenship (R. 2). Both Petitioners admitted these allegations (R. 12).

Suit was brought in the Northern District of Texas where both petitioners reside and have their offices, where the U. S. Engineers Contracting Officers' office is located in Fort Worth, and where many acts of performance of the contract took place; but the dam itself is located about thirty miles northeast of Dallas, which as reference to a map will show is three or four miles over the District line in the Eastern District of Texas.

ARGUMENT

Objections to Granting the Writ

Respondent objects to the granting of the writ for the reason that Petitioner has not complied with Rule 21 of this Court, in that the whole record is not before the Court. Respondent's Original Exhibits 7, 8, 11, 13 and 15 (marked

Plaintiff's Exhibits), and Petitioner's Original Exhibit 14 (marked Defendant's Exhibit), were sent to the United States Court of Appeals in lieu of copies, and are not in this Court. These include the prime contract, the specifications thereto, and the priorities regulations. They are essential to determination of any questions regarding these instruments. In the alternative, Respondent moves the Court that certiorari issue to the United States Court of Appeals, Fifth Circuit, to send up the originals of these instruments, in lieu of copies, as they are too bulky to copy. In this connection, pursuant to Rule 36(6) of this Court, in the light of Rules 12(4) and 21(1), Respondent has applied to the presiding judge of the Court of Appeals for an order to send up these exhibits, but under the precise wording of the rules here, it is not clear that Respondent is entitled to or will receive this order.

Reply to Questions Presented for Review

Generally.

Respondent says that the court below had jurisdiction both of the subject matter and of the parties, and that the question Petitioner raises on jurisdiction of the subject matter, raised for the first time in this Court, is in reality one of venue, which has been waived. The court had jurisdiction of the parties in any event of the suit against the principal, by reason of diversity, and certainly had jurisdiction thereby by reason of Tecon's cross-complaint against Caldwell.

Secondly, there is no important question of Federal law to be decided. The statute involved with the word "his" in it, on which word Petitioner bases his whole argument, was passed September 8, 1950, and supplemented by a regulation thereunder 25 days later omitting the word. *(N. P. A. Regulation 2,* supra, *p. 5)*. The statute was therefore effective for only 25 days, before the events here at issue took place, and could not therefore be important enough to justify the attention of this Court. The word "his" was omitted from all subsequent regulations and omitted from the Amending Act of Congress of June 30, 1952, *Pocket Supp., 50 U. S. C. A., App. 2157.* Both the Act and the regulations thereunder are long since obsolete [*Pocket Pt., 50 U. S. C. A., App. 2166(a)*].

The only other issues are simple fact questions, heretofore thoroughly argued and rightly decided against Petitioner.

Reply to Question for Review No. 1.

Here Petitioner claims, by a one-paragraph argument without authorities, under the provisions of 40 U. S. C. A. 270b(b), that *every* suit on the bond shall be brought in *any* district in which the contract was to be performed, *and not elsewhere,* the District Court for the Northern District of Texas would not have jurisdiction because the dam was over the district line in the Eastern District. Respondent answers that the question is one of venue, and even if not, the trial court had jurisdiction.

Jurisdiction of the Federal courts is a general grant to adjudicate. "The locality of a lawsuit—the place where judicial authority may be exercised"—relates to the convenience of litigants and is a matter of venue. *Nierbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 84 L. Ed. 167, 60 S. Ct. 153 (1939)*, Frankfurter, J.; *Industrial Assn. v. Commissioner, 323 U. S. 310, 89 L. Ed. 260, 65 S. Ct. 289 (1945)*, Stone, Ch. J. This is a basic and historical difference in the Federal courts.

Here, Article III, Sec. 2, Cl. 1 of the United States Constitution, *28 U. S. C. A. 1331, 1332, and 1345*, supra, *2*, and *40 U. S. C. A. 270b(b)* (See App., p. iii), firmly fixed jurisdiction of the parties and subject matter. If the United States is the real party in interest, as the old cases held under the Heard Act (see App. i) [*U. S. F. & G. v. U. S., 204 U. S. 349, 51 L. Ed. 516, 27 S. Ct. 381 (1097)*, Harlan, J.; *Davidson Co. v. U. S., 213 U. S. 10, 53 L. Ed. 677, 29 S. Ct. 324 (1909)*, Moody, Jr.], jurisdiction of the parties is fixed by the Constitution and *28 U. S. C. A. 1345*. If Respondent, the creditor, is the real party in interest, as the new cases hold under the Miller Act (see App. iii), [*U. S. v. Bush Co., 109 F. Supp. 378 (Mich., 1953), Ann. 77 A. L. R., 205-206*], jurisdiction of the parties is fixed by *28 U. S. C. A. 1332*, as there is complete diversity of citizenship. Furthermore, this Article in any event would fix jurisdiction of the court because Petitioner Tecon's cross-complaint was against Caldwell as the named cross-defendant.

The trial court also had jurisdiction of the subject matter under the Constitution and *28 U. S. C. A. 1331*, because the priorities regulations of the United States were at issue, and this suit was not only on the bond under Section 270b, (b), but was also against the principal. Finally, jurisdiction of the subject matter as to the suit on the bond was fixed by Article 270b (b).

It is submitted that the language in 270b (b), that the suit shall be brought in *any* district where the contract is performed *and not elsewhere*, relates to the place where the suit shall be brought. The word "brought," used in 270b(b), is not used in the jurisdictional Constitutional Article and statutes above cited, and is consistently used in the venue statutes [compare *28 U. S. C. A. 1391*, supra, *3, 1404(a), 1406(a); Sec. 12, Clayton Act. 15 U. S. C. A. 22;* and statutes mentioned in *Ann. 93 L. Ed. 21*]. It has been held that the word "brought" in such statutes means venue. *Motoshaver, Inc. v. Schick, Inc., 100 F. 2d 236 (9th Circuit, 1938)*, and statutes as to location using the word "brought" refer to venue in the "meaning ordinarily given to the words used." *General Electric Co. v. Marvel Co., 287 U. S. 430, 77 L. Ed. 408, 53 S. Ct. 202 (1932)*, Brandeis, J.

Thus read, the words "brought in * * * any district * * * and not elsewhere" in 270(b) are identical in meaning with the words "brought only" in *28 U. S. C A. 1391.* (See App. v.) Surely the words "and not elsewhere" are equivalent to the word "only." These phrases and words relate to location, and thus venue.

Respondent has found no cases exact in point. One case mentioning the provisions of 270b (b) refers to them as "special venue provisions." *U. S. v. Henke Co., 35 F. Supp. 388 (Mo., 1940).* There is an annotation in *93 L. Ed. 21* of similar statutes construed as venue statutes. The Act as printed in *49 Stat. 794* contains the word "venue" in the margin opposite section 2(b).

Two classes of the old cases, construing the Heard Act (App. i), might cause confusion. Two of these, *Davidson Co. v. U. S.* (supra), and *U. S. v. Congress Construction Co., 222 U. S. 199, 56 L. Ed. 163, 32 S. Ct. 44,* van Devanter, J., decided in 1909 and 1911 respectively, talk about jurisdiction because they were decided in the interval between 1906 and 1922 when *Ex parte Wisner, 203 U. S. 449, 51 L. Ed. 264, 27 S. Ct. 150 (1906),* Fuller, Ch. J., was in effect. The courts, during that interval, under this case, ruled many cases now held venue then to be jurisdiction, and the *Wisner* case was of course specifically overruled in *Lee v. C. & O. Ry., 260 U. S. 653, 67 L. Ed. 443, 43 S. Ct. 230 (1922),* van Devanter, J. In each of the *Davidson* and *Congress* cases, an objection to the place of suit was urged in the trial court, so that the same result would have been reached whether the question was of venue or jurisdiction, and in the *Davidson* case, before the 1905 amendment to the Heard Act, a different point was involved.

The other class of such cases above referred to, include *U. S. v. Silverberg Co., 10 F. Supp. 121 (N. Y., 1935,* and *U. S. v. Century Co., 9 F. Supp. 809 (Maine, 1935).* These

involved the Heard Act, which was superseded by the Miller Act in 1935. The Heard Act provided for one bond with a duel obligation of *performance* to the United States, and *payment* to subcontractors, laborers and materialmen. It provided for suit within six months by the United States, in which creditors could intervene, and suit within the next six months by creditors. Only *one* suit in *the* district was permitted with pro rata distribution, and *personal* notice to all known creditors and notice by *publication* required. This procedure caused intolerable delay and hardship on the creditors. Then the Miller Act was enacted providing for two bonds, one for performance to the United States and one, large in amount, for payment to creditors, and providing for as many suits as creditors might need, each of which could be brought in ninety days after work was done or material furnished, in *any* district where the contract was performed. *Vol. 79, Congressional Record, 74th Congress, 1st Session, 11,702, 13,382,* and *House Report 1263* and *Senate Report 1238,* same *Session.* The Miller Act contains no provision for notice to creditors, or such a semi-receivership proceeding. The *Silverberg* and *Century Co.* cases, supra, simply held that only one suit could be brought under the Heard Act. Both the Heard and Miller Acts are set forth in the appendix to this brief.

It would therefore seem that the provision that the suit may be brought under the Miller Act in *any* district where the contract is to be performed relates to venue, and as such was waived under the provisions of *28 U. S. C. A. 1406(b),* by failure of petitioner to urge its objection.

Even if the provisions of the Miller Act are jurisdictional, jurisdiction was still proper even as against the Petioner bondsman. The reason is that all or nearly all administrative performance of this contract was done at the principal office of the company in Dallas. Some at least of the contract documents were signed and executed there. The letters introduced in evidence, the conferences between Respondent and Tecon, the records, the offices of the supervising officers and the work by them, were respectively sent, received, held, kept, located and done in Dallas. Under the prime contract [Respondent's (Plaintiff's) Original Exhibit 15], discrepancies in specifications, claims for adjustments, unknown conditions, names of machinery to be used, and disputes, were all to be called to the attention of the Engineers in Fort Worth, in the Northern District (Articles II, III, VII, IX, XV). The time extensions, the change in the plans, and the approval of plans called for in Articles III and X of the prime contract and in the specifications were made by the contracting officers and submitted to him by petitioners in Fort Worth. Articles GC-5, p. 3, GC-7, p. 4, GC-15, p. 6, SC-6, p. 13, SC-8-10, p. 68, and many other articles of the specifications (Def. Orig. Ex. 14) called for performance of Petitioner with the contracting officer in Fort Worth. Thus it is undeniable that part of the execution and performance was in the Northern District. Even under the Heard Act, where performance was done in three separate districts, a creditor could bring his suit in any one of the three districts. *U. S. F. & G. v. McNulty, 13 F. 2d 78 (1st Circuit, 1926).*

Also, it is to be remembered that the trial court unquestionably had jurisdiction on that part of Respondent's suit which was against Tecon, the principal, and of Tecon's cross-complaint against Caldwell, by reason of diversity and the fact that under *28 U. S. C. A. 1391 (c)*, the corporations were residents of the Northern District of Texas because admittedly doing business there. Since the trial court thus had jurisdiction over part of the suit, it retained jurisdiction for the whole. This had been specifically held, even under the Heard Act, in *U. S. v. Marshall, 225 F. 760 (2nd Circuit, 1915)*. There the Government sued the contractor and his surety at their residence and not where the contract was to be performed, on the performance obligation, and the creditors intervened. It was held that the court had jurisdiction on the Government suit, and could retain it as to the part for the creditors on the bond.

Finally, in construing the statute and the bonds given under it, it is well to remember the words of Justice Brandeis that "it must be construed liberally," and that "technical rules * * * have never been applied in proceedings under this statute." *Illinois Surety Co. v. John Davis Co., 244 U. S. 376, 61 L. Ed. 1206, 37 S. Ct. 614 (1916).*

[Note: It is thought that the provisions of 6 U. S. C. A. 10, which would permit suit in the Northern District, are replaced by the specific revenue provisions of 270b (b).]

Reply to Question for Review No. 2.

Petitioner argues on pages 13 to 24 of his petition that by reason of the use of the word "his" in *50 App. U. S. C. A.*

2157, the defense provisions thereof are personal to the person complying with the priority laws, and are available to no other person. This ingenious argument is subject at the outset to the objection that this Act was amended June 30, 1952, and the word "his" omitted. Since this section is remedial in character, not substantive, it would apply retroactively to acts prior to the time of amendment where the trial is subsequent. This case was filed and tried long after the amendment. But the argument is subject to a still more serious and fatal objection: although the first regulation of September 18, 1950 [N. P. A. (1)] contains the word "his" in Section 10.13 thereof, all subsequent regulations beginning with N. P. A. 2, October 3, 1950, Section 11.22, supra 5, ommitted the word "his," so that the regulations read "No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance, etc." [Resp. (Pl.) Orig. Ex. 13]. Since these regulations, by the terms of the Act, are given the force of law, it appears that Petitioner's argument is without substance. *(50 U. S. C. A., App. 2157, 2073, 2154, Supra 4.)*

Respondent contends that where compliance by anyone with the priority regulations renders performance of a promissor impossible, unmixed with fault or negligence on his part, the promissor is excused. Thus in this case it would not be just for Respondent to have the Government, for whom the work was being done, to prevent performance by enactment of priority laws and issuance of priority regulations, deny Respondent a remedy against his sup-

pliers who could not perform on account thereof, make a settlement with Petitioner, the only person who could represent Respondent with the Government, such settlement being Change Order No. 12, and then, through its Courts, permit Petitioner to collect damages from Respondent for delays the Government itself caused.

But in any event, Section 2157, as amended, without the word "his," and the regulations issued under Section 2154, supra 4-5, are but a statemnt of the general law. As was held in the leading case of *Bailey v. DeCrespigny (1869), L. R. 4, Q. B. 180, 38 L. J. Q. B. M. S. 98, 15 English Ruling Cases 799:*

> "To hold a man liable by words, in a sense affixed to them by legislation subsequent to the contract, is to impose on him a contract he never made."

It is the law of the land in this country that where performance of a contract is rendered legally impossible by subsequent legislation, the promissor is discharged. *6 Corbin, Contracts, 336, 364,* and *Sec. 1345; Sec. 458, Restatement of Contracts; 12 Am. Jur. 956; Moller v. Herring, 255 F. 670, 3 A. L. R. 624 (5th Cir., 1919) (construing Texas law); Griel Bros. v. Madson, 179 Ala. 444, 60 So. 876, 43 L. R. A. (N. S.) 664; Burgett v. Loeb, 88 N. E. 346; Jersey Ice Cream Co. v. Banner Cone Co., 86 So. 382, 204 Ala. 532; Mawhinney v. Milbrook Woolen Mills, 231 N. Y. 290, 132 N. E. 93, 15 A. L. R. 1506.* Dicta in Texas cases are to the same effect: *Houston Ice & Brewing Co. v. Keenan, 99 Tex. 79, 88 S. W. 197; Cook Paint & Varnish*

Co. v. Lydick-Darman Co., 230 S. W. 2d 581 (Civ. App., writ dism., 1950).

The facts here are not as Petitioner misstates them, but are instead that performance was rendered legally impossible at an earlier date by the workings of the priority laws and the delays of the engineers. A single source was specified (R. 99, Item K); only one source was known (R. 54); and one witness had been trying to find a different source for fifteen years (R. 178). The impossibility of finding any other source was admitted by Petitioner's witness at the trial (R. 269). This witness was Petitioner's Chief Engineer (R. 223). Furthermore, Respondent was never in default, as stated on pages 13 and 22 of the petition. The specific regulations applicable are in evidence [R. 150, Resp. (Pl.) Orig. Ex. 13]. Lastly, the hearsay testimony cited by Petitioner on pages 21 and 24 that no priority was needed, was no more than a statement that the suppliers would at that time try to get the order out without a priority. Subsequent events proved they could not do so, and the facts are also that priorities were needed before that time (R. 157-179, 182-5, 188). But Petitioner says, in his petition, pages 16-21, that even if the word "his" be disregarded, Respondent is not excused under the Texas cases. These cases do not appear applicable. In *Texarkana Pipe Works v. Caddo Oil & Refining Co., 252 S. W. 813*, the court held simply and squarely that the cause of the failure to deliver was a fire. Seller's surplus above what was pre-empted by the priority laws was destroyed, and it was of course immaterial that he had other oil which

the law required him to deliver to another. Besides, the facts were that the Seller could have bought on the open market so that performance was not, as here, impossible, but was only more expensive. Likewise, *Dunbar v. Fuller, 253 S. W. 2d 684*, cited by Petitioner on page 26, is not remotely in point. The Government regulations did not go into effect until October 3, 1950, and the well that was required to be drilled had to be drilled by August 27, 1950. The performance date had passed more than a month before the regulations were issued.

The *Keenan* case, cited by Petitioner on page 16, states the law specifically at issue here in the following dictum, at *88 S. W. 197, 198:*

> "Where the performance becomes impossible by a change in the law, the promissor is discharged."

10 Tex. Jur. 435, cited by Petitioner on page 18, is not in point because it was impossible to obtain the commodity elsewhere, in this case.

Reply to Question for Review No. 3.

Here Petitioner, on pages 22-24, argues weight of testimony. He says that the testimony that delays were caused by the priority system is opinion testimony. Doubtless some of it is, but the men who gave it were experts, officers of the companies, and engineers, who had more intimate knowledge than any other persons. For that matter, if one examines the Origin of Experience with Kant, every-

thing and every observation is an opinion. Much, however, of Respondent's evidence of diligence was not opinion.

On pages 23 and 24, Petitioner states there was evidence of other causes of delay. In fact, there was no such evidence, and the Court of Appeals, after considering the detailed argument and analysis of the record thereon, so found. To refute all these misstatements would require complete analysis again of all the testimony, and Respondent does not believe it is either necessary or proper now to file so voluminous a reply brief. The Supreme Court, at least on a petition for ceritorari, should be able to take the facts as found by the Court of Appeals, and not be compelled to analyze the whole record. Should the Court, however, wish to do so, attention is invited to the fact that full argument has been had thereon below. For this purpose, all available copies of Respondent's brief and reply brief below, and of Petitioner's brief below, are attached to this brief in a separate package. Attention is respectfully invited to pages 10-17 of Respondent's reply brief therein, specifically replying to Petitioner's charges of delays by respondent, and also to pages 1-13 and 19-42 of Respondent's original brief on the facts.

It is thought that if these briefs be considered, the testimony, regulations and the contract documents carefully analyzed by this Honorable Court, the same conclusion will probably be reached as that in the Court of Appeals: that the learned District Judge, in his late eighties in age, tried this case so hurriedly that he simply did not understand it, and that the delays were caused by the priorities

laws and delays of the Engineers in deciding on plans; and lastly, that there was no evidence to the contrary.

Reply to Question for Review No. 4.

Petitioner makes no argument on this point, other than as heretofore stated, and Respondent therefore only states that it was impossible to manufacture and make delivery lawfully any sooner than it was done. Any earlier performance would have been unlawful.

Reply to Question for Review No. 5.

Petitioner argues, on pages 24-25, that delays in delivery due to the delay of the U. S. Engineers were not excusable.

Of course, delays of the United States Engineers in approving plans fall in a category like that of delays of the Government in directing Respondent to give priority to defense work. The only difference is that the priority system is an act of sovereignty, and that of the Engineers in delaying plans is an act in a contractual capacity. It is to be noted in this connection that the prime contract, Article 9(c), page 10-A [Resp. (Pl.) Orig. Ex. 15], specifically excused Petitioner from damages from acts of the Government in either capacity, or "delays of subcontractors due to such causes."

It is a sound proposition of law that the owner of work cannot by his own act prevent a contractor from performing the contract and then collect damages for its nonperformance. The same is true as to his subcontractor. A

case which is directly in point is that of *U. S. v. John Kerns Construction Co., 140 F. 2d 792, 152 A. L. R. 1340, 8th Cir., 1944.* There, as here, the defendant had a contract with the Government to build a dam. There, as here, the plaintiff was a subcontractor. His contract was dated June 22, 1940, and the work was to be completed by December 15, 1940. The Engineers did not approve the plans finally until April 14, 1941. There, as here, the plaintiff sued for the contract price. There, as here, the district judge erred and rendered judgment for the defendant. The United States Circuit Court reversed, with instructions to render judgment for the plaintiff. The upper court said that the plaintiff's contract to complete the performance was rendered impossible by the acts of the Government in failing to submit plans until after the time for performance was passed. The court said that plaintiff's contract contained the implied condition that the plans, whether changed or not, would be approved before and not after the expiration date of plaintiff's contract.

The court further held that the contractor defendant (appellee construction company) in that case could not hold the plaintiff subcontractor (appellant) chargeable with the omissions of the Government Engineers.

> "The law as stated is not challenged by the appellees. They seek to avoid its effect by a claim—'that appellees were not chargeable with any acts or omissions of the Government's engineers.' The court below found, in substance, that the Construction Company did nothing to delay the appellant in the performance of the sub-contract. In a sense, that is true, since it

was the acts of the Government engineers, for which neither the Construction Company nor the appellant was responsible, that caused or contributed to the failure of the appellant to complete the work required of him under the sub-contract within the time fixed by it. But the effect of the acts of the Government engineers was to add to, change and delay the work which, under the prime contract, the Construction Company was required to perform. These changes in the prime contract made it necessary for the Construction Company to call upon the appellant to do the changed work. The appellant was doing work which the prime contract obligated the Construction Company to perform for the Government. While the sub-contract required the appellant to do this work for the contractor, it was work which could not have been performed within the time prescribed in the sub-contract. A ruling that, under such circumstances, the appellant was liable to the Construction Company for liquidated damages for a delay which could not have been avoided, we think cannot be justified."

The defendant contended that the plaintiff subcontractor should have presented his claims to the Government. The court held that the plaintiff could not do so, and that that was a matter which had to be worked out between the contractor and the Government. There, as here, the Government did not recognize any contractual relations with the subcontractor. The court therefore specifically held that where the Government engineers delayed submitting plans the contractor could not hold the subcontractor in any manner for damages.

It is submitted that the case is squarely in point with the instant case, and that the Petitioner here was the only one who could settle with the Government, and that it reached

an accord and satisfaction thereon in Change Order No. 12. It is further submitted that even if, as Petitioner contends, plaintiff were bound to make delivery by February 1951, it could not do so when the requisite plans which were required to be approved before manufacture of the electrical equipment could be commenced, were not approved until May 26, 1951.

Reply to Question for Review No. 6.

Petitioner argues on pages 25 and 26 that defects in the specifications would not excuse delay. The necessary corollary to this argument is that Respondent should manufacture the machinery without regard to the imperfections, presumably whether the machinery would operate or not. The fallacy of this argument is that Article II of the prime contract required that imperfections in the specifications should be submitted to the Contracting Officer, and the same provision, as well as Article VII thereof, and numerous provisions of the specifications, required the Engineers' approval before the contractor could proceed [Resp. (Pl.) Orig. Ex. 15]. For this reason, the authorities cited by the Petitioner do not seem to be applicable.

CONCLUSION

It will therefore be seen that the court below had jurisdiction of the subject matter and also the parties. Simple justice is that the Government, for whom the work was to be done, prevented performance before the summer of 1952 by acts of a sovereign character in carrying on the war,

and of a contractual character by not rendering the final decision on the electrical plans until the summer of 1951. Petitioner represented Respondent in dealings with the Government, and reached an agreement with the Government satisfactory to it, and now seeks to charge Respondent for the damages, if any, that the Government caused. It is simply unjust. Likewise it is to be remembered that Respondent has suffered a loss of approximately $25,000.00 beyond what is sought in this case. This novice of a contractor, on its first big job, confessedly in bad faith on its misrepresentations as to amounts due on estimates in breach of its contract, to avoid payment in the amounts then due (R. 125, 212, 267), should not be permitted longer to delay simple justice due this old, experienced foundry, with fifty-four years of honest dealings in good faith at the same stand.

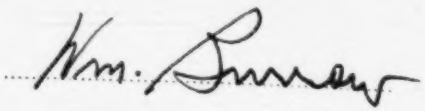
Respectfully submitted,

HAWKINS GOLDEN,
WILLIAM BURROW,
LEAKE, HENRY, GOLDEN & BURROW,
First National Bank Building,
Dallas, Texas,

Attorneys for Respondent.

Of Counsel:
W. BRUCE WHITE,
EUGENE H. HAWKINS,
SMYER, SMYER, WHITE & HAWKINS,
Title Building,
Birmingham, Alabama.

I hereby certify that a copy of this Reply has been delivered to opposing counsel in person this 17 day of October, 1955.



APPENDIX

In the

Supreme Court of the United States

OCTOBER TERM, 1955

No. 411

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF FIDELITY AND GUARANTY COMPANY,
Petitioners,

v.

TEXAS CONSTRUCTION COMPANY AND UNITED STATES CALDWELL FOUNDRY AND MACHINE COMPANY, INC.,
Respondent.

HEARD ACT:

Former 40 U. S. C. A. 270; Acts: Aug. 13, 1894, c. 280, 28 Stat. 278; Feb. 24, 1905, c. 778, 33 Stat. 811; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167; repealed Aug. 24, 1935, c. 642, Sec. 5, 49 Stat. 794: Bonds of Contractors, etc.

Heard Act, Former U. S. C. 270:

> 'Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual *penal bond*,

with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and *any person*, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to *any action instituted by the United States on the bond of the contractor*, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed *pro rata among said interveners. If no suit should be brought by the United States within six months* from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials *shall, upon application therefor*, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and *shall be, and are hereby, authorized to bring suit in the name of* the United States in *the* district court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, *and not elsewhere*, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, That where suit is instituted by any of such

creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: And provided further, That where suit is so instituted by a creditor or by creditors, *only one action shall be brought*, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: Provided further, That in all suits instituted under the provisions of this section such *personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors*, and in addition thereto notice of *publication in some newspaper* of general circulation, *published in the State or town* where the contract is being performed, for at *least three successive weeks*, the last publication to be at least three months before the time limited therefor." (Emphasis ours.)

MILLER ACT, 40 U. S. C. A., 270 a, b:

"§ 270a. Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country

"(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of

any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

'(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

"(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000. * * *.

"§ 270b. Same; rights of persons furnishing labor or material

"(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period *of ninety days* after the day on which the last of the labor was done or performed by him or *material was* furnished or supplied by him for which such claim is made, *shall have the right to sue on such payment bond for the amount*, or the balance thereof, unpaid at the time of institution of such suit and to prosecute

said action to final execution and judgment for the sum or sums justly due him: * * *

"(b) Every suit instituted under this *section shall be brought* in the *name of the United States* for the use of the person suing, in the United States District Court for *any* district in which *the contract* was to be performed and executed and *not elsewhere*, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit. Aug. 24, 1935, c. 642, § 2, 49 Stat. 794."